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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-117

NATIONAL BROILER MARKETING ASSOCIATION,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals
for the Fifth Circuit

BRIEF FOR PETITIONER

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INDEX

	Page
Opinions Below	1
Jurisdiction	2
Question Presented	2
Statutes Involved	2
Statement	3
Introduction	3
Facts	4
The Formation of Petitioner and the Antitrust Litigation	7
Summary of Argument	9
Argument	12
Introduction	12
I. The Language, Context, History, and Administrative Interpretation of the Term "Farmer" in the Capper-Volstead Act Show That the Act Covers the Integrated Broiler Producer Who Temporarily Relinquishes Custody of the Bird During Its Grow-Out Phase	13
II. The Purposes of the Capper-Volstead Act Would Be Ill Served by a Construction That Excluded Integrated Broiler Producers From Its Scope	20
Conclusion	27
Statutory Appendix	A-1

CITATIONS

Cases:

Bayside Enterprises, Inc. v. National Labor Relations Board, 429 U.S. 298 (1977) 10, 18, 19

Case-Swayne Co. v. Sunkist Growers, Inc., 389 U.S. 384 (1967) 23

Case-Swayne Co. v. Sunkist Growers, Inc., 369 F.2d 449 (9th Cir. 1966), rev'd on other grounds, 389 U.S. 384 (1967) 15

Continental T.V., Inc. v. GTE Sylvania, Inc., 97 S.Ct. 2549, 2561 n.26 (1977) 25

Garth, 56 T.C. 610 (1971) 24

In Re: Chicken Antitrust Litigation, Civil No. C74-2454A (N.D.Ga.) 7

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National Labor Relations Board v. Hearst Publishers, 322 U.S. 111, 129-31 (1944) 18

Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co., 370 U.S. 19 (1962) 6

Tigner v. Texas, 310 U.S. 141, 145-47 (1940) 18

United States v. Borden Co., 308 U.S. 188 (1939) 23

United States v. Citizens and Southern National Bank, 422 U.S. 86, 113 (1975) 22

United States v. Shimer, 367 U.S. 374 (1961) 18

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Capper-Volstead Act, Section 1, 7 U.S.C. § 291 . A-1 and passim

Capper-Volstead Act, Section 2, 7 U.S.C. § 292 ..... passim

Clayton Act, Section 6, 15 U.S.C. § 17 2

Cooperative Marketing Act of 1926, 7 U.S.C. § 451, et seq. 22

Farm Credit Act of 1971, 12 U.S.C. § 2129 18

Sherman Anti-Trust Act, Section 1, 15 U.S.C. § 1 ... 2, 12, 24

Treas. Reg. § 1.471-6(a) 24

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Rule 23(e), F.R. Civ. P. 7

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62 Cong. Rec. 2052 (1922) 14, 15, 21

62 Cong. Rec. 2059 (1922) 21

62 Cong. Rec. 2060 (1922) 21

62 Cong. Rec. 2172 (1922) 15

62 Cong. Rec. 2173 (1922) 10, 15

62 Cong. Rec. 2217 (1922) 24

62 Cong. Rec. 2227 (1922) 17

62 Cong. Rec. 2262 (1922) 21

62 Cong. Rec. 2273 (1922) 17

H.R. Rep. No. 24, 67th Cong., 1st Sess. (1921) 15, 19

H.R. Rep. No. 116, 69th Cong., 1st Sess. (1926) 22

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (A. 111)[1] is reported at 550 F.2d 1380. The opinion of the district court granting petitioner's motion for partial summary judgment (A. 81) is not officially reported, but appears at 1975-2 Trade Cas. ¶ 60,509. The order of the district court granting summary judgment and dismissing the complaint (A. 105) is not reported.

[1] "A" references are to the joint appendix filed by the parties in this Court.

JURISDICTION

The judgment of the court of appeals (A. 133) was entered on April 22, 1977. The petition for a writ of certiorari was filed on July 21, 1977, and granted on October 11, 1977. The jurisdiction of this Court is founded on 28 U.S.C. § 1254(1).

QUESTION PRESENTED

The Capper-Volstead Act provides that "[p]ersons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers" may form cooperative associations which are exempt from Section 1 of the Sherman Act. The question presented is whether integrated producers of broiler chickens are precluded from qualifying as "farmers" within the meaning of the Capper-Volstead Act because, although they own the flocks, make all production and marketing decisions, incur more than 90 percent of the cost of producing the broiler chicken, and assume the primary risk of market price fluctuations, they employ independent contractors to tend the chickens during the "grow-out" phase from chick to mature chicken.

STATUTES INVOLVED

Section 1 of the Sherman Act, as amended, 15 U.S.C. § 1, provides in pertinent part that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. . . ."

Section 6 of the Clayton Act, 15 U.S.C. § 17, provides in pertinent part:

> "Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of . . . agricultural . . . organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws."

The Capper-Volstead Act, 7 U.S.C. §§ 291-292, is printed in its entirety in the Statutory Appendix to this brief. Section 1 of the Act provides in pertinent part:

> "Persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged. Such associations may have marketing agencies in common, and such associations and their members may make the necessary contracts and agreements to effect such purposes. . . ."

STATEMENT

Introduction

The Department of Justice filed this civil antitrust suit against petitioner, a national cooperative marketing association of producers of broiler chickens, charging the association and its members with having combined in violation of Section 1 of the Sherman Act. The essence of the charge is, in the words of the Solicitor General, that the members "routinely exchange

price information and attempt, in other ways, to ensure a market at stable prices for their members." (Br. in Opp. 2.)

Petitioner moved for summary judgment on the ground that the Capper-Volstead Act exempts the challenged activities from Section 1 of the Sherman Act. The district court granted the motion and ordered the complaint dismissed. The Court of Appeals for the Fifth Circuit reversed, holding that petitioner was excluded from the protection of the Capper-Volstead Act because the integrated producers who comprise it are not "farmers" within the meaning of the Act.

Facts

The facts are stipulated (A. 91). Broilers—conceded to be an "agricultural product" within the meaning of the Capper-Volstead Act (A. 7)—are young chickens, slaughtered at seven to nine weeks of age, processed, and offered for sale ready to cook. Their production involves the following steps: (1) raising, breeding, and placing breeder flocks for the production of eggs to be hatched as broiler chicks; (2) hatching the broiler eggs and placing the broiler chicks; (3) raising the chicks for a period of seven to nine weeks; (4) catching and cooping the grown-out chickens and hauling them to processing facilities; and (5) preparing the broilers for market (A. 7). Originally, each step was in the hands of a different entity, but gradually the growers, hatcherymen, feed dealers, etc. integrated into most or all phases of broiler production (A. 14). Today more than 95 percent of the broilers marketed in the U. S. are marketed by integrated broiler producers (A. 10).

The typical "integrator," as the integrated broiler producer is known, performs each of the five steps in broiler production listed above with the partial exception of step 3, the "grow-out"

stage.[2] In this stage the integrators hire "growers" to provide certain services and facilities in raising the integrator's chicks to maturity, when the integrator resumes custody of his chickens. Even during the grow-out stage, when the grower has physical custody of the chickens, it is the integrator rather than the grower who makes all decisions regarding the diet and type of feed of the growing chickens and supplies all of the feed consumed by the chickens. The integrator, not the grower, transports the chicks and feed to the growers and the grown-out chickens from the grower to the processing plant. The integrator, not the grower, provides all of the equipment and some or all of the labor for catching, cooping, and loading the live birds. The integrator determines the volume of production, and makes all decisions with regard to the age and size at which the birds shall be marketed. The integrator's fieldmen or supervisors visit the grower frequently (usually every week) to monitor the grower's performance (A. 9-10).

More than 90 percent of the total cost of producing a broiler is incurred by the integrator and less than 10 percent by the grower (A. 11-13, 67). The grower's investment is limited mainly to the buildings in which the chickens are housed during

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[2] Information regarding the operations of 54 integrator members and former members of NBMA is included in the record. In addition to directing the broiler grow-out operation and owning the broilers throughout the production process, most NBMA members (or firms they own or are commonly owned with) own and operate processing plants in which broilers are slaughtered and dressed for market, feed mills, breeder flocks for the production of broiler eggs, and hatcheries in which the eggs are hatched to become day-old chicks from which broilers are raised. Six of the 54 do not own or control breeder flocks or hatcheries, but purchase chicks from outside sources. One owns a hatchery but does not own or control a breeder flock. Six members do not own or control feed mills, but purchase feed from outside sources. Four members do not own or control any broiler processing facilities; their processing is done through a contractual relationship with another company. Two members do not own or control breeder flocks, hatcheries or feed mills. (A. 8).

the grow-out period. Title to the birds remains with the integrator throughout the grow-out phase.[3]

As the owner and marketer of the birds, the integrator bears the primary risk of changes in prices due to market conditions, which the Department of Justice concedes are typical of those prevailing in agriculture generally and in some cases even more difficult for producers to cope with than is true with respect to other agricultural commodities (A. 14-15). Fresh broilers, which constitute 90 percent of the broiler market, are a perishable commodity and must be marketed regardless of demand. And because the sellers are scattered and uninformed with respect to conditions of demand and supply, the broiler market is highly susceptible to overproduction. Moreover, demand is both seasonal and cyclical, and the buying side of the market is highly concentrated (A. 15).

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[3] Of the 57 grower contracts in use by petitioner's members and former members, 54 vest ownership of the broiler flocks placed with growers entirely in the members. One contract provides that the member and the grower shall have "joint ownership," and another that the member agrees "to sell broiler chicks" and "to sell to Grower the necessary feed, vaccines, medication, and sanitation products necessary to raise said birds to processing age." (A. 8-9). However, the latter contract further provides that "in the event of death of the birds at anytime prior to the time they are picked up from the Grower's premises, Grower assumes any losses due to the expenditure of labor, use of land, facilities, equipment, and the cost of any fuel or litter. [Member] assumes the loss of the cost of the chicks, feed and other materials supplied by [member]." Undisputed affidavits establish that the title provisions in both contracts are included only to accommodate financing (A. 87, 342, 344).

The third contract is the one in use by a member which is itself a cooperative composed of persons engaged in growing broiler chickens (A. 9). Membership of one producers' cooperative in another such cooperative, and federations of cooperatives, are authorized by the provision in the Capper-Volstead Act that "such associations may have marketing agencies in common." 7 U.S.C. § 291; see *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co.*, 370 U.S. 19 (1962).

While most contracts with growers provide for full payment only with respect to birds surviving to marketable age, mortality of birds during the grow-out phase of broiler production averaged only 3.26 percent in a survey of Southern broiler flocks (A. 67).

As a result of the foregoing conditions, integrator profits are both unstable and low, while the grower enjoys a stable return in the nature of a wage (A. 12, 18, 19, 71-74). Integrated broiler production has enabled rural families to maintain or supplement their incomes by acting as contract growers for the integrated producers (A. 19).

The Formation of Petitioner and the Antitrust Litigation

In 1969 the Antitrust Division of the Department of Justice issued a business review letter to the effect that the National Egg Company, a co-operative association of egg producers, would not forfeit its exempt status if it admitted to membership an integrated egg producer that contracted out the care of laying hens in the same manner—described above—as broiler integrators contract out the growing-out of broiler chickens.[4] On the basis of the Antitrust Division's position as expressed in this letter, petitioner association was formed in 1970 (A. 6).

The Justice Department changed its view of the law in 1971 and two years later brought this suit. In its wake more than 30 treble damage class actions were brought against petitioner, some of its members and other producers on behalf of virtually all the nation's purchasers of broiler chickens (other than ultimate consumers). These actions are pending at the district court level in the Fifth Circuit.[5]

The district court in the present case granted summary judgment for petitioner, because (A. 90):

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[4] Letter from Richard W. McLaren, Assistant Attorney General, Antitrust Division to Irving Isaacson, Esquire dated November 24, 1969, Re: National Egg Company—Request for Business Review.

[5] In re Chicken Antitrust Litigation, Civil No. C74-2454A (N.D. Ga.). Plaintiffs in those cases have executed settlement agreements with most defendants (not including petitioner) which, subject to certain contingencies and court approval pursuant to Rule 23(e), F.R. Civ. P., provide for payments to plaintiffs' putative classes in excess of $30,000,000.

> "The involvement of the members of the defendant association in the production of the broilers is sufficient to justify their classification as '[p]ersons engaged in the production of agricultural products as farmers . . .' within the meaning of the Capper-Volstead Act and to permit their claim to the antitrust exemption to the extent permitted by that statute."

The Court of Appeals for the Fifth Circuit reversed, being unable to "conceive that the ordinary, popular sense of the word 'farmers' would fit broiler integrator companies. . . . Whatever else farming may mean, an irreducible minimum must be either husbandry of animals or crops or farm ownership" (A. 123). The court stated (*id.*):

> "NBMA cautions us against a romantic view of agriculture and points out that agriculture has changed greatly from the Jeffersonian conception of the self-sufficient yeoman. We agree that agriculture has changed much. But the ordinary, popular meaning of the word 'farmer' has not. When the common run of people wish to speak of the broader spectrum of modern agriculture, the word generally used is 'agribusiness.' 'Farmer' still means what it meant in 1922 —one who owns or operates a farm . . . . We believe the Capper-Volstead Act, with its listing of beneficiaries—farmers, planters, ranchmen, dairymen, nut or fruit growers—has a feeling, a cadence of meaning, that has no place for NBMA's member companies."

Reviewing the legislative history of the Capper-Volstead Act (which was enacted in 1922), the court emphasized the defeat of a proposed amendment (the Phipps amendment) that would have permitted sugar and other manufacturers to come under the shelter of the Act if they entered into pre-planting contracts with the farmers from whom they bought the agricultural products used in their manufacturing activities and if the contracts gave the farmers a percentage of the manufacturer's price for the

finished product. While the court acknowledged "that there are differences between the contractual arrangement prevalent in the broiler industry and the arrangements that would have been covered by" the rejected amendment (A. 128), it thought the rejection indicated Congress's intention to keep "subject to the antitrust laws those companies that prepare farm products for market" (A. 129).

SUMMARY OF ARGUMENT

Broiler chickens are an agricultural product that is produced by highly integrated broiler producers. Although these producers own the birds from the day they are hatched (and usually own the breeder flocks and hatcheries as well), are responsible for every step in the production process, and incur more than 90 percent of the total cost of broiler production, they generally employ independent contractors known as growers to keep and tend the chickens during the seven to nine week grow-out phase. The integrator not only retains title to the birds during the grow-out phase but also furnishes their feed and other supplies and closely supervises the grower. Nevertheless, the court below held that, solely because they relinquish custody of the birds to the contract grower during the grow-out phase, the integrated producers are not "[p]ersons engaged in the production of agricultural products as farmers" within the meaning of Section 1 of the Capper-Volstead Act, and therefore cannot join an agricultural cooperative as authorized by that Act. In so holding, the court disregarded the language of the Act, the context in which that language appears, the legislative history, the treatment of the issue by the agricultural agencies, and the underlying purposes of the Act.

A "farmer" is someone engaged in farming, which means simply agricultural production. Broiler chickens are conceded to be an agricultural product within the meaning of the Capper-

Volstead Act, and they happen to be produced by integrated producers. Those producers are today's poultry farmers. To deem the grower the only farmer engaged in producing broiler chickens, when his part of the production process repesents only 10 percent of the total cost, would be to ignore the way in which this agricultural product is actually produced.

Moreover, the context of the term "farmer" in the Capper-Volstead Act shows that it is a term of extension rather than limitation: the Congress concerned lest the term be used to exclude the tiny nut-growing industry could not have meant to deny the entire poultry industry the protection of the Act, yet that is the practical effect of the decision below.

The legislative history also strongly supports our reading of the Act. In listing "farmer" among the agricultural producers who were to be protected, Congress desired to extend the Act to "all of those who have anything to do with raising anything from the soil or from the farm." 62 Cong. Rec. 2173 (1922). Our interpretation of "farmer" gains added support from the unequivocal legislative intent to include both plantation owners, who do no farming (in the narrowest sense of the word) themselves but instead employ tenant farmers, and corporate farm enterprises, which are also not "farmers" in the popular sense relied on by the court below. Even more at variance with the court's stereotyped and anachronistic conception of farming is the fact that, were the integrated producers to buy out the growers, they would then concededly be farmers under the Capper-Volstead Act. Yet the completion of their vertical integration would make them even more dramatic examples of "agribusiness," which the court below deemed utterly antithetical to the popular sense of the term "farmer," than they are today.

Under this Court's recent decision in *Bayside Enterprises, Inc. v. NLRB*, 429 U.S. 298 (1977), the views of an agency which confronts on a daily basis the problems and peculiarities of a particular industry are entitled to substantial consideration. The

federal agricultural agencies routinely treat integrated poultry producers as farmers within the meaning of the Capper-Volstead Act, further supporting our construction.

Finally, the construction for which we contend advances the purposes of the Capper-Volstead Act. They are (1) to improve the bargaining strength of agriculture vis-à-vis the purchasers of agricultural products, (2) to reduce the risks to which agriculture is peculiarly subject as a result of uncertainties of nature and dispersion of producers, and (3) to preserve a role for small farmers in agricultural production.

(1) The integrated producers are the real producers and marketers of poultry products in this country. If they are denied the right to form cooperatives, the protections of the Capper-Volstead Act will be denied to a major sector of American agriculture. The producers' income will be less, and this will mean less income for their partners in the production process, the independent contract growers.

(2) The exchange of price information among producers—the very practice challenged by the complaint—has a valuable role to play in reducing the market risks to which poultry production, like other branches of agriculture, is, as the Department of Justice concedes, subject. Antitrust immunity is necessary to further the important stabilizing purposes of the Act; antitrust enforcement would retard it.

(3) Just as franchising creates a role for the small businessman in the distribution system of a modern economy, so integrated production enables his counterpart in farming, the grower, to participate in modern agricultural production. Strip the integrator cooperatives of their antitrust exemption, and the forces working to transform the independent contract grower into an employee of a fully integrated poultry producer will simply be accelerated.

ARGUMENT

Introduction

Section 6 of the Clayton Act expressly exempts the activities of certain agricultural cooperatives from Section 1 of the Sherman Act. Qualification for the exemption is governed by Section 1 of the Capper-Volstead Act (*Maryland and Virginia Milk Producers Ass'n v. United States*, 362 U.S. 458 (1960)), which authorizes formation of exempt cooperatives by "[p]ersons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers."

Farming has changed since 1922, when the Capper-Volstead Act was passed. A poultry farmer circa 1922 was a man who had chicken coops and a fenced yard for his chickens to wander about in. The modern poultry farmer is a vertically integrated enterprise, an "integrator," controlling hatcheries and breeder flocks, feed mills and slaughterhouses. The newly hatched broiler chick is trucked by the integrator's employees to buildings in which the chicks, numbering in the tens of thousands, spend the next seven or eight weeks, virtually immobilized and fed by conveyor belt and never allowed outdoors; then they are collected and trucked by the integrator to his processing plant.

If the integrator owns the buildings in which the chicks are raised to maturity, then, all concede, he is a poultry farmer within the meaning of the Capper-Volstead Act despite the lack of resemblance to a 1922-style poultry farmer. Often, however, the buildings are owned by someone other than the integrator—by a "contract grower" whom the integrator hires to tend the chicks during the grow-out phase of broiler production. Title to the birds remains with the integrator throughout the entire production process from egg to dressed bird even when he uses a contract grower rather than his own employees to tend the birds during the grow-out phase. Moreover, the

integrator supplies the necessary feed and veterinary services, as well as continuous supervision, during that phase. Ninety percent of the total cost of broiler production is incurred by the integrator, and only 10 percent by the contract grower.

The question in this case is whether the integrator who uses a contract grower rather than his own employees to tend his birds during the grow-out phase thereby forfeits his status of farmer and becomes disentitled to join an agricultural cooperative. Since a contract grower is functionally much like an employee, answering this question in the affirmative might simply accelerate an existing trend toward the absorption of the contract grower by the integrator (see pp. 24-25, *infra*). Alternatively, it might induce the integrators to rewrite their contracts with the contract growers to designate the latter as lessor-employees rather than independent contractors.[6] The decision below is thus, at best, an exercise in empty formalism and, at worst, the death warrant of the independent growers.

The court below erred in deeming such results compelled by the Capper-Volstead Act. We shall demonstrate that its reading of the Act is refuted by every aid to statutory interpretation there is.

I. The Language, Context, History, and Administrative Interpretation of the Term "Farmer" in the Capper-Volstead Act Show That the Act Covers the Integrated Broiler Producer Who Temporarily Relinquishes Custody of the Bird During Its Grow-Out Phase.

The court below, on the combined authority of intuition and *Webster's Third New International Dictionary*, defined "farming" as "husbandry of animals." In so doing, it made an arbitrary

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[6] As suggested in Roy, *Alternatives for Integrators*, Broiler Industry, September 1977, p. 31.

selection among *Webster's* many definitions of the term "farmer," and ignored the most relevant—one engaged in "farming," which *Webster's* defines simply as "the practice of agriculture." So defined, farmer and farming manifestly embrace the production of broiler chickens by integrators. But even the court's narrow definition of farming as animal husbandry includes the integrator, who in most cases[7] hatches the chick and in all cases supplies its feed and medicines, owns it, bears the risk of loss and of market price changes, and through fieldmen and other personnel closely supervises the contract grower who tends the bird during the grow-out phase of production.

In any event, it would be unsound to define "farmer" in the Capper-Volstead Act without considering the context in which the term appears, *i.e.*, as one of the "[p]ersons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers." 7 U.S.C. § 291. The manifest purpose of this string of terms is to prevent a narrow construction of "farmer" from defeating the broad purposes of a statute designed to foster cooperative agriculture. Could a Congress worried that nut growers might inadvertently be denied the benefits of the Act have intended to exclude the entire poultry industry?[8]

The legislative history makes plain that the term farmer is one of extension rather than limitation. One of the sponsors of the bill was asked: "Are the words 'as farmers, planters, ranchmen, dairymen, nut or fruit growers' used to exclude all others who may be engaged in the production of agricultural products, or are those words merely descriptive of the general subject?" 62 Cong. Rec. 2052 (1922). The reply was "descriptive." *Id.* The House Report states: "The aim has been to make the pro-

[7] See note 2, *supra*, p. 5.

[8] The nut-growing industry was one fifty-fifth the size of the poultry industry in 1922. Calculated from U.S. Dep't of Agriculture, *Agricultural Statistics* (1946), pp. 271-73; *id.* (1936), p. 281.

visions of the bill sufficiently liberal so that all cooperative farm associations operated in good faith for the benefit of its members might avail themselves of the provisions of the bill." H.R. Rep. No. 24, 67th Cong., 1st Sess. 1 (1921). An opponent of the bill described it, without contradiction, as embracing "all of those who have anything to do with raising anything from the soil or from the farm" (62 Cong. Rec. 2173 (1922)). It was explicitly stated that the Act embraced gardeners and plantation owners as well as the listed categories of agricultural producers. 62 Cong. Rec. 2052, 2172 (1922); note 9 *infra*.

The resolution of two important issues in the definition of "farmer" further demonstrates that the term cannot be limited to a 1922-style poultry farmer. First, it is undisputed that a corporation engaged in agricultural production is a farmer within the meaning of the Act. *E.g.*, *Case-Swayne Co. v. Sunkist Growers, Inc.*, 369 F.2d 449 (9th Cir. 1966), *rev'd on other grounds*, 389 U.S. 384 (1967). Yet in popular parlance a "farmer" is a natural person, not a corporation. Second, the legislative history makes crystal clear that the landowner whose land is farmed by tenant farmers is a "farmer" within the meaning of the Act.[9] In the typical sharecropping arrangement, the owner contributes the land, fertilizer, and seeds, the tenant farmer contributes his labor, and the parties split the proceeds from the sale of the crop 50-50. The equal division of the revenue implies an equal contribution to the cost of raising the crop. If the landowner is a "farmer" under the Capper-Volstead Act, though he does no farming personally and incurs only 50 percent of the cost of producing the crop, *a fortiori* the broiler integrator

[9] "Mr. Lynn . . . [I]f there are certain planters in the South with large plantations, probably with a number of tenants on their places, who want to belong to these associations. I think that those owners should come under this . . .

"Senator Walsh of Montana. Exactly . . . . ."

Hearings on H.R. 2373 before a Subcomm. of the Senate Comm. on the Judiciary, 67th Cong., 1st Sess. 195 (1921).

—who incurs more than 90 percent of the cost of producing a broiler chicken—is a farmer.

Never before has the term "farmer" in the Capper-Volstead Act been limited to the popular meaning adopted by the court of appeals. It is undisputed that if Quaker Oats owned a rice plantation which it leased to tenant farmers under a sharecropping arrangement, Quaker Oats would be a farmer within the meaning of the Capper-Volstead Act. The "romantic view" (Br. in Opp. 7) of agriculture adopted by the Justice Department and by the court below for purposes of the present case condones that result. By what logic, or even lexical ingenuity, is it possible to accord Quaker Oats the status of farmer but deny it to the producers of broiler chickens?

A related weakness of the court of appeals' popular-meaning approach is the anomaly created when, as is increasingly frequent and may become more so if the decision below is not reversed (see *infra* pp. 24-25), the growers are the integrator's employees rather than independent contractors. It is conceded that such an integrator, which might be a large corporation owning many feed mills and slaughterhouses, would nonetheless, by virtue of its ownership of its growers' premises, be a "farmer" under the Capper-Volstead Act. Yet such an enterprise would appear to exemplify even more than the typical integrator the inroads of "agribusiness," which the court below deemed antithetical to the popular meaning of "farmer," into traditional farming.

The court below also mistakenly inferred legislative intent not to include integrated producers in the Capper-Volstead Act from the defeat of the Phipps amendment. The amendment would have permitted firms that manufactured sugar from beets (or textiles from cotton) to form exempt marketing cooperatives if they had pre-planting contracts with their agricultural suppliers whereby the supplier would receive a percentage of the

manufacturer's price of his finished product. See 62 Cong. Rec. 2227, 2273 (1922). The proposed amendment was rejected because Congress did not wish to exempt the producers of any nonagricultural product—such as manufactured sugar and textiles—from the antitrust laws. But broiler chickens are conceded to be an agricultural product. The integrated broiler producer is not a manufacturer of some nonagricultural finished product who buys an agricultural input from a farmer; he is the producer of an agricultural product who delegates a small part of the production to another agricultural producer, the contract grower.[10]

There are no formal administrative decisions interpreting the term "farmer" in the Capper-Volstead Act, simply because the Act does not establish an administrative procedure for determining the eligibility of a cooperative. However, the practical construction of the term by the responsible agencies shows that integrated broiler producers are farmers under the Act. The Department of Agriculture assisted in the formation of petitioner association and has worked closely with it (A. 140). To this day the Department continues to encourage the formation of cooperative associations of producers who contract out various production functions—including the grow-out phase of beef production.[11] The Farm Credit Administration recently recognized the legitimacy of petitioner's status as a cooperative of agricultural producers by approving its eligibility to borrow from the New Orleans Bank for Cooperatives (A. 111), pursuant to

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[10] The statement in the court of appeals' opinion that "a few [of petitioner's members] operate only processing plants" (A. 114) is incorrect. It is stipulated that *all* members of petitioner initiate and direct the live production of the broilers, own the birds throughout the production process, and supply inputs accounting for more than 90 percent of the cost of production (A. 9-10). And see note 2, supra, p. 5.

[11] Ward, *Integrated Cattle Marketing—A Better Way*, U.S. Dep't of Agr. Farmer Cooperative Serv., FSC Info. 107, May 1977 (Pet. App. E, at A-38).

statutory standards materially identical to those of the Capper-Volstead Act. See 12 U.S.C. § 2129 (Supp. IV 1975).[12]

That courts should defer to the administrative interpretation of a technical term in a statute administered by the agency in question is well established. See, *e.g.*, *Bayside Enterprises, Inc. v. NLRB*, 429 U.S. 298 (1977); *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 129-131 (1944); cf. *United States v. Shimer*, 367 U.S. 374 (1961). We do not argue that informal agency action of the sort involved in this case is entitled to the same weight as a decision in a formal proceeding. We argue only that it is entitled to some weight. The court below gave it none.

The Justice Department would have this Court deny the agricultural agencies' judgment on the farmer status of broiler integrators any weight solely because those agencies lack antitrust expertise (Br. in Opp. 10). That is beside the point. The question whether a broiler integrator is a farmer is a matter of agricultural rather than of antitrust policy (the two policies cannot, of course, be equated[13]). Nothing in the Capper-Volstead Act or its history suggests that the threshold question of who is a farmer is to be decided by reference to antitrust policy—that if, for example, cotton growing were a highly concentrated industry this would be material to deciding whether cotton growers were farmers within the meaning of the Act.

Nor can the Department derive any support for its reading of the Act from *Bayside Enterprises, Inc. v. NLRB*, 429 U.S. 298 (1977). There this Court held that certain truck drivers employed by integrated poultry producers to convey feed from the integrators' feed mills to the contract growers were not "agricultural laborers" within the meaning of the federal labor laws. One point of distinction from the present case is that the drivers in question were employed by feed mills. Since chicken feed is not an agricultural product, a feed mill, even if owned by producers of agricultural products, is not a farm and its employees are not agricultural laborers. In any event, the Court in *Bayside* did not make an independent judgment as to the agricultural status of the employees in question: in accordance with the authorities cited above, it deferred to the responsible agency's judgment.

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[12] Even the Department of Justice believed until recently that integrated poultry producers were protected by the Capper-Volstead Act—a belief on which the producers relied in establishing the association attacked in this case. Petitioner's refusal to disband after the Department changed its mind is apparently regarded by the Department (see Br. in Opp. 5 n. 3) as vitiating the reliance which petitioner properly placed on the business review letter issued to National Egg Company.

[13] As this Court stated in *Tigner v. Texas*, 310 U.S. 141, 145-47 (1940):

> "[A]n impressive legislative movement bears witness to general acceptance of the view that the differences between agriculture and industry call for differentiation in the formulation of public policy . . . At the core of all these enactments [including the Capper-Volstead Act, specifically cited by the Court] lies a conception of price and production policy for agriculture very different from that which underlies the demands made upon industry and commerce by anti-trust laws. These various measures are manifestations of the fact that in our national economy agriculture expresses functions and forces different from the other elements in the total economic process."

The distinctiveness of agricultural policy and the resultant special expertise of the Department of Agriculture in administering the Capper-Volstead Act were explicitly recognized in the debates preceding its enactment. In the words of one Congressman, "the Secretary of Agriculture has been chosen as the public agency rather than some other agent of the Government because the Secretary of Agriculture is assumed to be familiar with the difficulties and problems which are peculiar to agriculture." 61 Cong. Rec. 1041 (1921). See also H.R. Rep. No. 24, 67th Cong., 1st Sess. 3 (1921).

II. The Purposes of the Capper-Volstead Act Would Be Ill Served by a Construction That Excluded Integrated Broiler Producers From Its Scope.

Construing the Capper-Volstead Act to embrace cooperatives of broiler integrators is necessary to secure the purposes of the Act as they are revealed in the debates and committee reports that preceded its enactment. The purposes were threefold: (1) to increase the income of the agricultural sector; (2) to reduce the risk and instability characteristic of agricultural production; and (3) to help the small farmer. All three purposes would be advanced by upholding the farmer status of broiler integrators and retarded by denying them that status.

1. The Congress that enacted the Capper-Volstead Act believed that allowing agricultural producers to band together in cooperatives would increase the bargaining power and hence relative income of farmers vis-à-vis purchasers of farm products, especially middlemen. "This bill is intended to help agriculture reach that degree of business organization and development which will give to it greater economic strength." 61 Cong. Rec. 1041 (1921). "Congress desires to encourage farmers in forming cooperative business organizations and to use such organizations as a means of promoting agricultural prosperity and adding to the profits of the business of farming." 59 Cong. Rec. 7851 (1920) (debate on a predecessor bill to the Capper-Volstead Act).

The production of poultry is a major branch of agriculture today as it was in 1922. And virtually the entire output of the industry is produced by integrated producers, for while the members of petitioner association are producers of broiler chickens, the same kind of growing contract is used by producers of eggs, turkeys, ducks, and other poultry products. Thus, if the decision below is affirmed, the poultry industry will be excluded from the protection of the Capper-Volstead Act. This would be an enormous constriction in its scope.

To be sure, the court below in dictum suggested that the contract growers may form Capper-Volstead cooperatives. But the logic of the court's "ordinary, popular meaning" approach would seem to exclude the contract grower from the definition of "farmer" since he has no crop to market. More important, the grower is a relatively unimportant factor in the production of poultry, supplying elements which account for less than 10 percent of the total cost of production. The integrated producers *are* the poultry farmers in this country today. The decision below would therefore exclude a $7 billion dollar[14] branch of U.S. agriculture from the protection of the Capper-Volstead Act.

2. The framers of the Capper-Volstead Act wanted to reduce the notorious instability of agricultural prices and profits resulting from climatic uncertainty, perishability, dispersion of producers, inadequate transmission of market signals and the like.[15] The Justice Department has conceded that the market conditions in the broiler industry are those characteristic of agriculture generally and are marked by sharp fluctuations in demand and supply that are due in part to the fact that the poultry sellers are scattered and uninformed with regard to demand and supply conditions (see Statement, *supra*, p. 6).

This concession is highly significant in view of the charge in the antitrust complaint in this case. As described by the Solicitor General, it is that the members of petitioner association exchanged price information among themselves with a view

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[14] See U.S. Dep't of Agriculture, Economic Research Service, *Poultry and Egg Situation*, June 1977, p. 18.

[15] The Congressmen who debated the bill were united in their concern about "the instability of agricultural prices, the rapid and absurd fluctuations to which they are subjected" (61 Cong. Rec. 1041 (1922)), the need for "stabilizing the market" (62 *id.* 2059 (1922)) and the "hazardous" character of agricultural production (62 *id.* 2060 (1922)). See also 61 *id.* 1042 (1921); 62 *id.* 2052, 2262 (1922).

toward stabilizing the market for broiler chickens. Whatever the legality of such information exchanges in the ordinary markets subject to antitrust law—an unsettled question at this time—[16] they are manifestly beneficial under the extraordinary conditions of producer ignorance and dispersion that are characteristic of agricultural markets—including, by stipulation, the market for broiler chickens. The role of information in promoting agricultural price stability is a persistent theme in the history of the formulation of national agricultural policy. In the House Report accompanying the Cooperative Marketing Act of 1926, 7 U.S.C. § 451, et seq., passed just four years after the Capper-Volstead Act, we read: "It is highly important that [cooperative] associations should be allowed to keep their members fully informed in regard to all of the factors affecting the demand for their products. It is generally known that farmers, due to the large number of them and to their widely scattered geographical situation, proceed in many respects unintelligently in regard to the production and marketing of their products." H.R. Rep. No. 116, 69th Cong., 1st Sess. 2 (1926).

Moreover, given the nature of the charge in this case—an exchange of price information designed to stabilize the broiler market—the Justice Department can derive no support from the principle that immunities from the antitrust laws must be narrowly construed. All of the cases cited by the Justice Department applying this principle to the Capper-Volstead Act (Br. in Opp. 9-10) involve attempts by agricultural producers to extend their antitrust immunity to practices that the framers of the Act did not want to immunize from the antitrust laws, such as the predatory practices at issue in *Maryland and Virginia Milk Producers Ass'n v. United States*, 362 U.S. 458 (1960), or the conspiracies with nonagricultural producers involved in *Case-*

[16] See *United States v. Citizens & Southern National Bank*, 422 U.S. 86, 113 (1975); Note, *Antitrust Liability for an Exchange of Price Information—What Happened to Container Corporation?*, 63 Va. L. Rev. 639, 656-60 (1977).

Swayne Co. v. Sunkist Growers, Inc., 389 U.S. 384 (1967), and *United States v. Borden Co.*, 308 U.S. 188 (1939). Never before has it been thought proper in the service of "narrowly" construing the Capper-Volstead Act to exclude an entire branch of agriculture from forming producer cooperatives to engage in practices that are clearly immune.[17]

3. The final purpose of the Capper-Volstead Act was to help the small farmer. The Justice Department and the court below exaggerate in suggesting that this is the only purpose of the Act. If it were, the implications would be staggering. Many farmers in the U.S. today are corporations[18] and most U.S. farmers are big businessmen by the standards of 1922.[19] Yet no one has ever suggested that corporate farmers, or farmers whose assets exceed the level appropriate to a sturdy Jeffersonian yeoman, are excluded from the protections of the Capper-Volstead Act.

The legislative history does contain evidence of solicitude for the small farmer, but not to the exclusion of the large. Most of the discussion in the floor debates dealt with the plight of

[17] Section 455 of the Cooperative Marketing Act of 1926, 7 U.S.C. §455, expressly authorizes Capper-Volstead cooperatives to engage in exchanges of price information among members.

A holding that cooperatives which include broiler integrators are immune from Section 1 of the Sherman Act will not create a serious danger that abuses of the competitive process might go uncorrected. The Capper-Volstead Act contains administrative remedies against unduly high prices and, in addition, exempt cooperatives are subject to the proscriptions of Section 2 of the Sherman Act against abuse of monopoly power. *Maryland and Virginia Milk Producers Ass'n v. United States, supra.*

[18] 18,930 as of 1966. U.S. Dep't of the Treasury, Internal Revenue Service, *Corporation Income Tax Returns for 1966*, p. 6.

[19] Gross annual income per farm was $1671 in 1922, $35,978 in 1975. U.S. Dep't of Agriculture, *Agricultural Statistics* (1952), p. 691; (1976), p. 467.

agriculture generally, rather than that of the small farmer in particular. See, *e.g.*, 61 Cong. Rec. 1041-42 (1921). Plantation owners, as we have seen, were definitely intended to be within the protective coverage of the Act. The purpose of the Act was to make agriculture more businesslike, not more pastoral. Agriculture was described as "the biggest of all business." 62 Cong. Rec. 2217 (1922).

The solicitude shown the small farmer merely strengthens our argument that broiler integrators are farmers under the Act. If only the owner of premises on which chickens are raised during the grow-out phase is a farmer, then the integrators may decide to buy out the contract growers and transform them into employees. This would secure the integrators' exemption from Section 1 of the Sherman Act and thereby enable them to engage in exchanges of price information that are both privately valuable to them and, as we have argued, socially beneficial. It would also protect the tax advantages that accrue to their "farmer" status and have been jeopardized by the decision below.[20] To change the contract grower from an independent businessman into an employee will not further the purposes of the Capper-Volstead Act even as narrowly conceived by the Department of Justice.

The Department argues that it is speculative whether the integrators will in fact complete their forward integration in order to avoid the antitrust liability created by the decision below. Perhaps the Department is unaware that integration into the grow-out phase is already proceeding by leaps and bounds. The percentage of broilers produced by fully integrated enterprises (*i.e.*, producers whose growers are employees rather

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[20] See, *e.g.*, *Garth*, 56 T.C. 610 (1971) (integrated egg producer held to come within the term "farmer" as used in Treas. Reg. § 1.471-6(a), which provides for special inventory accounting methods available only to farmers).

than independent contractors) tripled between 1955 and 1977.[21] In Mississippi, which ranks fifth among the states in the production of broiler chickens, the share of broilers grown by totally integrated producers has already reached 27 percent.[22] There are those who believe that "broilers of higher quality can be produced at a lower cost [at a fully integrated, one-site broiler production complex] than using the conventional contract-growing method."[23] In these circumstances, it is not surprising that experts on the poultry industry believe that the Fifth Circuit's decision in this case may well accelerate the trend toward integration into the grow-out phase.[24] The opinions of impartial experts carry more conviction than the groundless hope of the Justice Department that the poultry industry will fail to react to a decision that denies it the ability to obtain a stable price for its product.

That antitrust liability, by creating incentives to vertical integration, may disserve the interests of the small businessman was recently emphasized by this Court in the analogous context of franchise distribution. See *Continental T.V., Inc. v. GTE Sylvania Inc.*, 97 S.Ct. 2549, 2561, n. 26 (1977). Like franchise distribution, contract growing is an ingenious method of fostering small business by shifting some of the risks of entrepreneurship to larger businessmen better able to bear them. The fast-food franchisee can go into business with a small capital investment because he has the use of the trademark, goodwill, and

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[21] See Torgerson, *After NBMA, What Next?—Five Scenarios*, Broiler Industry, August 1977, p. 20; U.S. Dep't of Agriculture, Economic Research Service, *Poultry and Egg Situation*, June, 1977 p. 43.

[22] See Roy, *Alternatives for Integrators*, Broiler Industry, September 1977, p. 31.

[23] Leppert, *Produce Broilers at Less Cost in a One-Site Production Complex*, Broiler Industry, March 1977, p. 32.

[24] See Torgerson, *supra* note 21, Roy, *supra* note 22.

know-how of a much larger company (the franchisor). In just the same fashion, the contract grower can enter the broiler chicken industry with minimum risk. The integrator supplies the chicks, feed, other supplies, veterinary services, supervision, coopage and hauling, thereby assuming 90 percent of the total cost of broiler production. And he also assumes the market risk, always great in agriculture—specifically, the risk of an unexpected decline in the market price of broiler chickens from the time when the eggs are hatched and the day-old chicks are placed in the broiler house to the time when they are ready for market.

Modern poultry production, operating within the framework of the Capper-Volstead Act, is a marvel of efficiency.[25] The small farmer has a role as contract grower that is consistent with the achievement of maximum efficiency. The antitrust immunity conferred by the Capper-Volstead Act enables cooperatives to cope effectively with demand and supply uncertainties that exceed what is found in the industries subject to the antitrust laws. The repeal of that immunity by the court below will, if upheld, incite a search for ways of preserving the stability of the industry's prices. One way is for the integrator to buy out the contract grower and transform him into an employee; some believe this may happen. An alternative would be an increase in the concentration of poultry production, for larger firms may be better able, through diversification of activities or centralization of information, to cope with the market uncertainties

[25] In 1950, for example, it took twelve to fourteen weeks on average for a broiler to reach 3.5 pounds (live weight). In 1975 it took only seven to eight weeks on average for a broiler to reach 3.5 pounds. This represents an increase in efficiency of more than 42 percent. In 1940, four pounds of feed was required to produce one pound of broiler. In 1975, only 2.1 pounds of feed was required to produce one pound of broiler. This represents a 92 percent increase in the amount of broiler produced from each pound of feed. Benson and Witzig, *The Chicken Broiler Industry: Structure, Practices and Costs* (U.S. Dep't of Agriculture, Agricultural Economic Report No. 381, 1977) pp. 7-8.

characteristic of agriculture generally and broiler production in particular.

These results cannot serve the purposes Congress had in mind in enacting the Capper-Volstead Act. They are compelled not by the language of the Act, or its legislative history or administrative interpretation, but by a narrow and unrealistic conception of farming which the court below improperly read into the Act.

CONCLUSION

For the foregoing reasons, the decision below should be reversed and the case remanded with directions to dismiss the complaint in accordance with the district court's judgment.

Respectfully submitted,

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APPENDIX

STATUTORY APPENDIX

Sections 1 and 2 of the Capper-Volstead Act, 7 U.S.C. 291 and 292, provide as follows:

> Sec. 1. Persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged. Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes: **Provided, however,** That such associations are operated for the mutual benefit of the members thereof, as such producers, and conform to one or both of the following requirements:
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> First. That no member of the association is allowed more than one vote because of the amount of stock or membership capital he may own therein, or
>
> Second. That the association does not pay dividends on stock or membership capital in excess of 8 per centum per annum.
>
> And in any case to the following:
>
> Third. That the association shall not deal in the products of non-members to an amount greater in value than such as are handled by it for members.
>
> Sec. 2. If the Secretary of Agriculture shall have reason to believe that any such association monopolizes or restrains trade in interstate or foreign commerce to such an extent that the price of any agricultural product is unduly en-

hanced by reason thereof, he shall serve upon such association a complaint stating his charge in that respect, to which complaint shall be attached, or contained therein, a notice of hearing, specifying a day and place not less than thirty days after the service thereof, requiring the association to show cause why an order should not be made directing it to cease and desist from monopolization or restraint of trade. An association so complained of may at the time and place so fixed show cause why such order should not be entered. The evidence given on such a hearing shall be taken under such rules and regulations as the Secretary of Agriculture may prescribe, reduced to writing, and made a part of the record therein. If upon such hearing the Secretary of Agriculture shall be of the opinion that such association monopolizes or restrains trade in interstate or foreign commerce to such an extent that the price of any agricultural product is unduly enhanced thereby, he shall issue and cause to be served upon the association an order reciting the facts found by him, directing such association to cease and desist from monopolization or restraint of trade. On the request of such association or if such association fails or neglects for thirty days to obey such order, the Secretary of Agriculture shall file in the district court in the judicial district in which such association has its principal place of business a certified copy of the order and all the records in the proceeding, together with a petition asking that the order be enforced, and shall give notice to the Attorney General and to said association of such filing. Such district court shall thereupon have jurisdiction to enter a decree affirming, modifying, or setting aside said order, or enter such other decree as the court may deem equitable, and may make rules as to pleadings and proceedings to be had in considering such order. The place of trial may, for cause or by consent of parties, be changed as in other cause.

The facts found by the Secretary of Agriculture and recited or set forth in said order shall be prima facie evidence of such facts, but either party may adduce additional evidence. The Department of Justice shall have charge of the enforcement of such order. After the order is so filed in such district court and while pending for review therein the court may issue a temporary writ of injunction forbidding such association from violating such order or any part thereof. The court may, upon conclusion of its hearing, enforce its decree by a permanent injunction or other appropriate remedy. Service of such complaint and of all notices may be made upon such association by service upon any officer or agent thereof engaged in carrying on its business, or on any attorney authorized to appear in such proceeding for such association, and such service shall be binding upon such association, the officers, and members thereof.